Supreme Court, U.S.
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No. 09-446

IN THE
Supreme Court of the United States

ANTHONY CALABRESE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Mr. Calabrese's petition for certiorari sets forth a clear, significant, and mature three-way circuit split on a substantial and recurring question: whether, in the absence of explicit statutory language to the contrary, a district court has discretion to consider the effect of a mandatory minimum like 18 U.S.C. § 924(c) when applying the 18 U.S.C. § 3553(a) factors to fashion a predicate sentence.

The Government tries to downplay the circuit split by arguing that four circuits have merely affirmed, without comment, district-court decisions that considered the effect of a mandatory minimum when fashioning the predicate sentence, and by re-characterizing the holdings of two other circuits that have expressly condoned the same practice. Those arguments only amplify the need for review. If the Government's view of sentencing law is correct, then criminal defendants subject to consecutive, mandatory minimum sentences who are charged in the First, Third, Fourth, Tenth, and Eleventh Circuits are receiving sentences that are unlawfully shorter than what Congress intended. Conversely, if the Government's view of sentencing law is wrong, then identically situated defendants who are charged in the Second, Seventh, and Eighth Circuits are receiving sentences that are unlawfully longer than what Congress intended. Meanwhile, identically situated defendants who are charged in the Sixth Circuit may receive an unlawfully longer or shorter sentence, depending on the district-court judge. This demonstrated lack of uniformity in sentencing among the Circuits presents a paradigm case for review. *United States* v. *Booker*, 552 U.S. 220, 223 (2005).

Alternatively, the Government argues that the sentencing issue is "largely academic" due to Mr. Calabrese's age. But the issue is not academic to Mr. Calabrese, who may in fact live long enough to enjoy the fruit of a favorable ruling. Nor is the issue academic to criminal defendants or the public, both of whom have the right to lawful sentencing.

What the Government seeks to avoid in advancing these procedural dodges is the Court's examination of the relevant statutory language. That is because the Government can only prevail if this Court is willing to rewrite the critical language of 18 U.S.C. § 924(c) so that it reads instead like 18 U.S.C. § 1028A:

18 U.S.C. § 924(c)(1)(D)	18 U.S.C. § 1028A(b)
Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.	Notwithstanding any other provision of law . . . (2) . . . no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

	(3) *In determining any term of imprisonment to be imposed for the [underlying] felony . . . a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section.*

Given the textual differences—one statute expressly forbids district courts from considering the effect of consecutive, mandatory minimum sentences when fashioning a predicate sentence while the other does not—the Government's position requires nothing less than a wholesale judicial amendment to Section 924(c). And the Seventh Circuit's willingness below to adopt the Government's position conflicts directly with this Court's requirement, articulated in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), that a statute must use unequivocal language to bar a district court's consideration of a particular sentencing rationale. Grant of Mr. Calabrese's petition is therefore warranted.

ARGUMENT

I. Reviewing the circuit split on this important sentencing issue that recurringly creates disparate outcomes is not merely "academic."

The Government urges the Court to deny Mr. Calabrese's petition to review his robbery sentence, calling the question merely "academic" because of his long, mandatory gun sentence. Resp. Br. at 6. While the mandatory 57-year portion of the sentence will make Mr. Calabrese an elderly man when he is eligible for release, it is entirely possible that he will live to that date. And any amount of time added to those 57 years by the district court because the Seventh Circuit tied the judge's hands—and not because she thought that additional time was appropriate—makes it increasingly unlikely that Mr. Calabrese will outlive his sentence. The issue is hardly academic.

Equally important, the Government's argument ignores the national lack of sentencing uniformity and the resulting need for this Court's guidance on a repetitive sentencing issue where many of the petitioners, by definition, will be facing long mandatory minimums as a starting point. What would the Government consider not "academic"? Release at age 75? Age 85 or 90? No years in a prison sentence are "academic" to the person serving the time, and the Government's argument overlooks the fact that there is a difference between a life sentence and a sentence for a term of years.

What *is* "largely academic" is the Government's other primary focus: splitting hairs about prece-

dential versus non-precedential authority. Supreme Court Rule 10(a), cited by the Government, notes that the list of reasons it provides do not control or fully measure the Court's discretion, and this Court has previously granted certiorari to consider splits that arose from district-court decisions. *See, e.g.*, *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981) (granting certiorari based on conflict among four federal district-court decisions where issue was "important and appears likely to recur"); *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978) (granting certiorari to resolve a conflict between a First Circuit opinion and a decision of the Northern District of Georgia); *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 & n.4 (1980) (granting certiorari where "[t]here [was] no direct conflict, but a number of decisions exhibit some tension" on important questions, citing federal appellate and district-court decisions). There is no requirement that "sanction" of lower court opinions take the form of affirmance with specific comment by the appeals court. In fact, the disagreements among district judges who regularly make sentencing decisions demonstrates the existence of confusion on this important issue.

Moreover, the Government is simply wrong to argue that the opinions of the First and Sixth Circuits in *Vidal-Reyes* and *Guthrie* are not in conflict with the Seventh Circuit.[1] The Government

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[1] *Cf. United States* v. *Ressam*, 593 F.3d 1095, __ n.8 (9th Cir. Feb. 2, 2010) (discussing a split between the Sixth Circuit's *Franklin* and Seventh Circuit's *Roberson* decisions, and the First Circuit's *Vidal-Reyes* decision, on the impact of

[Footnote continued on next page]

attempts to distinguish the First Circuit decision, *Vidal-Reyes*, as turning on the fact that the acts resulting in the mandatory minimum were not a predicate act of the underlying offense. But this was not an important factual distinction to the First Circuit: "[W]e would read the § 924(c) line of cases to support, at most, the presence of an implied sentencing limitation in § 924(c) that mirrors the express sentencing limitation in the text of § 1028A(b)(3), which applies to predicate offenses only." *United States* v. *Vidal-Reyes*, 562 F.3d 43, 52 (1st Cir. 2009).

The Government's position also ignores the First Circuit's broad reasoning, which is in direct conflict and irreconcilable with that of the Seventh Circuit. *Id.* at 50–56. For example, the First Circuit noted that reading "§ 1028A(b)(2) as barring the consideration of the statute's mandatory sentence in imposing a sentence[e] on *all other counts* would essentially render § 1028A(b)(3) superfluous." *Id.* at 52. That same argument applies here. The Government and the Seventh Circuit's approach would require courts to treat these two statutes in exactly the same way, despite the fact that § 1028A contains express instructions that § 924(c)(1) does not, as noted in the comparison chart, above. And this express distinction also shows why the Government's argument about 18 U.S.C. § 3551(a) does not end the matter. Resp. Br. at 7. The Government claims that the "no term of imprisonment" language of § 924(c)(1)(D) is a specific

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[Footnote continued from previous page]
§ 924(c) mandatory minimums on calculation of Guidelines when applied to grouped sentences).

provision that means § 3553(a) does not apply, but § 1028A contains that same language, and yet Congress still thought it necessary to expressly preclude consideration of other sentences in § 1028A(b)(3).

Similarly, the Government cannot reconcile *Guthrie* with *Roberson*, since the Sixth Circuit has essentially allowed district courts to depart from the Guidelines as long as no inference is raised that they did so in consideration of the mandatory minimum sentence. *United States* v. *Guthrie*, 557 F.3d 243, 247, 255 (6th Cir. 2009). Mere speculation that "other factors," Resp. Br. at 11, could have accounted for the departure is neither plausible nor enough to distinguish the authority that the Sixth Circuit has now given its lower courts.

In the end, the Government's position is strikingly at odds with the text of the statutes the Court is asked to interpret, and it ignores the vastly different sentencing outcomes depending on the Circuit in which a criminal defendant is convicted. If Mr. Calabrese had been lucky enough to be charged in Utah or Pennsylvania, his sentence would have been fashioned by considering the mandatory minimum. Instead, he was charged in Illinois, where the Seventh Circuit has erroneously grafted § 1028A(b)(3)'s prohibitory language onto § 924(c). This Court should grant the petition and reverse for re-sentencing.

II. The cumulative error doctrine requires Mr. Calabrese to receive a new and fair trial.

The Government maintains that there was nothing amiss about the Seventh Circuit's cumulative error analysis because, if anything, "only one trial error [was] found." Resp. Br. at 13. But the Government's conception of the cumulative error doctrine is faulty.

It is undisputed that the Due Process Clause's guarantee of a fair criminal trial requires that the effect of cumulative errors be considered. But an effective test must extend past weighing only those events neatly categorized by the courts of appeal as potentially reversible "errors." The Government cites *United States* v. *Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990), for the proposition that the fairness of a trial is considered only when more than one "error" can be cumulated. But the *Rivera* court still considered the overall fairness of the trial at issue there despite its so-called "one-error" rule. It simply did so as part of its overall Due Process/fundamental fairness analysis: "Courts have also found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances within the trial, even though such other circumstances may not individually rise to the level of error." *Rivera*, 900 F.2d at 1477 (quoting *Taylor* v. *Kentucky*, 436 U.S. 478, 487 & n.15, 98 S. Ct. 1930, 1936 & n.15 (1978)). *Accord, e.g., United States* v. *McLain*, 823 F.2d 1457, 1462–63 (11th Cir. 1987) , *overruled on other grounds, United States* v. *Watson*, 866 F.2d 381 (11th Cir. 1989); *United States* v. *Diharce-Estrada*, 526 F.2d 637, 642 (5th Cir. 1976) (ordering

new trial "[b]ased upon the combination of error and prejudicial circumstances recited").

Here, in Mr. Calabrese's trial, two major evidentiary claims were such "close calls" that the Seventh Circuit would have affirmed the opposite decisions from another judge. Under these circumstances, this Court should require a *Rivera* fundamental fairness review that includes a cumulative look at error as well as other prejudicial circumstances that do not individually arise to the level of error.

CONCLUSION

For the reasons above stated and those previously advanced, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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